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[Title of District Court and Cause]

OPINION

East, J.

Libelant was awarded herein a decree of damages against the Respondents and Claimant (Petitioners) in compensation for personal injuries received while working as a dock-working longshoreman employee of Brady-Hamilton Stevedore Company (Stevedore), third-party respondent herein, then engaged in loading and stowing the M/V Belgrano (Vessel) with lumber cargo and in all respects performing the stevedoring work on dock and on board the Vessel pursuant to a stevedore contract with the representatives of Vessel.

With the view of placing ultimate liability, if any, at the doorstep of Stevedore, the Petitioners interpleaded the Stevedore, petitioning for indemnity and reparations for all loss that they might sustain by reason of Libelant's claims. The Petitioners contend, inter alia:

A.

"2. As contracting stevedore, impleaded respondent owed the implied contractual obligation to perform the stevedoring work in a safe and proper manner.

"6. If (Petitioners) herein should be held liable in this case to libelant, then (Petitioners) have a right to recover over against impleaded (Stevedore) for full and complete indemnity because of said (Stevedore's) failure to perform its stevedore contract in a safe and proper manner * * *;"

B.

"4. The gear and machinery of the vessel were in good and seaworthy condition, and the accident was caused by negligence of (Stevedore) in failing to properly use said gear and machinery, and particularly in failing to properly secure the topping lift pennant (pigtail line) to the winch gypsy head.

"5. If the gear and machinery of the vessel were unseaworthy at the time of the accident, which (Petitioners) deny, then said unseaworthiness was either created by the negligence of (Stevedore), or was 'brought into play' by (Stevedore's) improper use of said gear and machinery or by (Stevedore's) negligence in using said gear and machinery after knowledge of its condition."

C.

"6. • • • and (Petitioners) are entitled to recover from and against (Stevedore) for all damages that may be awarded herein and for costs and expenses, including such reasonable attorney's fee as may be incurred by (Petitioners) in defending against the libel."

The issue of indemnity was segregated and reserved awaiting adjudication of Libelant's claims against Petitioners.

In connection with the segregated issue of Libelant's claim, the Court concluded[1] that the Vessel was unseaworthy in that her topping "lift gear" for the starboard boom at No. 1 hatch malfunctioned and permitted the

[1]Court's opinion upon the segregated issue of Petitioner's liability to Libelant, entered April 14, 1960. 1960 A.M.C. 867; 189 Fed. Supp. 103.

boom to fall upon the Libelant, and more particularly:

"(1) * * *

"3. That (pawls) on the ratchet in the topping lift gear was (were) defective and inadequate in that it (they) did not drop into each cog as the boom was hoisted so as to prevent the boom from falling."

"(2) That (Petitioners) were negligent in:

"4. Failing to properly inspect said vessel and particularly the said ratchet and (pawl) device to said hatch to determine the defective nature of same * * * (Reasonable inspection would have disclosed the malfunctioning of the pawls, known to the longshoreman the day before.)

"5. Failing to provide (the) libelant with a safe place to work * * *"

"(3) That said unseaworthiness of the vessel and concurring negligence of (Petitioners) were the proximate causes of the falling of the boom and libelant's resulting injuries."

The segregated and reserved issue of Petitioners' claim for indemnity from Stevedore is now ripe for packaging.

As will be later pointed out, the circle of judicial legislation is now complete except for trimming the loose ends of the knot and making it shipshape. The longshoreman who was deprived of a cause of action to recover damages for personal injuries caused through the negligent act of his employing stevedore by the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C.A. § 901, et. seq., has now for all practical purposes regained this comfort.

The first stage of this metamorphosis commenced by clothing the longshoreman (seaman pro hac vice) with the mantle of protection against unseaworthiness of the Vessel in whose service he worked, all to the despair of the shipowner.[2]

The second stage was the bringing of the employer-stevedore to accountability for causing the unseaworthy condition through the now out-of-favor theory of active negligence of stevedore versus passive negligence of the shipowner.[3]

Then the third stage, where a stevedore is now ultimately liable to make reparations for loss resulting from

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[2] "There would seem to be no aspect of judicial legislation in the mere permission of suits by longshoremen and harbor workers against shipowners or other third parties. Such suits are contemplated by the Longshoremen's Act. 33 U.S.C. 933.

"However, criticism can validly be directed at the extension of the doctrine of unseaworthiness to longshoremen whose employers are wholly at fault, permitting recovery from the vessel. Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 80 (1946)." Excerpt from an address by Edward C. Holden, Jr., Esq., of New York City, to the Federal Bar Association Convention, Washington, D. C., September 20, 1957.

[3] "The manifest injustice to shipowners leads to the permission of recovery by the innocent shipowner from the employer of longshoremen, making recovery from the employer by the employee, by indirection, possible in some instances in plain contravention of the Longshoremen's Act, as was decreed in the Palazzolo case.

"Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956). Black, J., dissenting, at 141, stated: 'Liability is thus imposed because of the negligence of the employer's other employees. This the act forbids. Whether called "common law indemnity," "contribution," "subrogation," or any other name, the result is precisely the same. The employer has to pay more "on account of" an injury to his employee than Congress said he should.'

"Accordingly it must be conceded that the letter and spirit of the Federal Longshoremen's and Harbor Workers' Compensation Act receives scant attention from the courts." Excerpt from Mr. Holden's address.

its breach of a pre-existing continuing contractual duty, namely, the failure while performing its stevedore contract to meet its contractual warranty to handle the cargo and use the ship's gear incidental thereto with reasonable safety in light of expertise in the field. This is so even though the ship's gear may have been malfunctioning and therefore unseaworthy when taken over by a stevedore. Smith v. Jugoslavenska Linijska Plovidea, 278 F.2d 176; at p. 180 (4 Cir., April, 1960), citing Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

Will the cycle be eventually completed with a fourth-stage judicial sanction of an action by the injured longshoreman directly against his defaulting employer-stevedore, on the premise that the longshoreman was engaged in ship's service and was a person who in the reasonable contemplation of the parties to the warranty might be expected to be injured through failures caused by the Stevedore's breach of warranty to handle cargo and use ship's gear incidental thereto with reasonable safety.[4]

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[4] It has been said that a stevedore's warranty of workmanlike service is comparable to a manufacturer's warranty of the fitness of its manufactured products. Ryan Stevedoring Co. v. Pan-Atlantic SS Co., 350 U.S. 124. Generally, see Prosser on Torts (2 Ed. 1955), § 84.

In DiVello v. Gardner Machine Co., 102 NE2d 289 (Ohio 1951), a manufacturer's warranty for the fitness of its product (grinding wheel which exploded) was extended to the injured employee of the purchaser of the product, although not in privity of contract of purchase, but being a "workman of the vendee who was injured in its ordinary use because of latent defects." For a like holding, see Peterson v. Lamb Rubber Co., 343 P.2d 261 (Cal. App. 1959).

Also see Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 99-100 (Sup.Ct. NJ, 5-9-60), wherein the Court says:

"In the present matter, the basic contractual relationship is between Claus Henningsen, Chrysler, and Bloomfield Motors, Inc. The precise issue presented is whether Mrs. Henningsen, who is

In view of the ultimate holding to follow, it is not necessary to deal with Petitioners' contentions (B, above) of a breach of Stevedore's warranty by reason of negligent use of the Vessel's gear (pigtail line dog and gypsy head locking devices) by a longshoreman-employee of Stevedore, which in turn "put into play" the defective and unseaworthy "lift gear" was under the teachings of Crumady.

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not a party to their respective warranties [driver of defective car] may claim under them. In our judgment, the principles of those cases and the supporting texts are just as proximately applicable to her situation. We are convinced that the cause of justice in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against the defendant Chrysler.

"By a parity of reasoning, it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.

"Harper and James suggest that this remedy ought to run to members of the public, bystanders, for example, who are in the path of harm from a defective automobile. 2 Harper & James, The Law of Torts, 1956 Ed., p. 1572."

Compare Gottsdanker, a minor, v. Cutter Laboratories, et al.; Phipps, a minor, v. Cutter Laboratories (consolidated cases Nos. 18413 and 18414, District Court of Appeals, First Appellate District, Division Two, State of California), entered July 12, 1960, wherein it was held that the defendant manufacturer of Salk vaccine which "contained live virus of poliomyelitis" were held liable for causing the resulting diseases in each of the plaintiffs when inoculated by physicians with the vaccine secured through independent suppliers for the doctors.

Is it not logical to further suggest that since the Stevedore's warranty to perform his work with reasonable safety runs to the protection of the Vessel, that it also and necessarily runs to the protection of persons working in the ordinary course in her service as "seamen pro hac vice"?

In passing, we might say there is strong suspicion of such negligence,* but suspicion in and of itself is not as yet circumstantial evidence of negligence.

The tenable basis of Petitioners' claim for indemnification is simply the alleged breach by Stevedore of the contractual implied in-fact warranty in its stevedoring contract to perform its contract with reasonable safety.

For the duties of the Stevedore to the Petitioners in the performance of its stevedoring contract, we find that:

"[I]n Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 567, 78 S.Ct. 438, 441, 2 L.Ed. 2d 491, the Supreme Court, after stating that the stevedore's contractual obligation to perform his work *with reasonable safety* related not only to handling of cargo, but also *to the use of equipment incidental thereto*, said: '* * * If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery. * * *' While a standard to be applied to 'conduct * * * sufficient to preclude recovery' has not been created, it has been decided that the mere furnishing of defective equipment by the ship to the stevedore does not bar recovery over under the contract. Crumady v. The Joachim Hendrik Fisser, supra; Calmar S.S. Corp. v. Nacirema Operating Co., 4 Cir., 1959, 269

*"The winch driver called to a ship longshoreman and asked for 'a hand' in attaching the free end of the pigtail line to the gypsy head. The winch operator did not see this operation, and the longshoreman involved can give no satisfactory account of what he did in the way of fixing the free end of the pigtail line to the gypsy head. In any event, it was somehow attached, but evidently not properly." Excerpt from prior opinion

F.2d 79; American Export Lines, Inc. v. Revel, 4 Cir., 1959, 266 F.2d 82." [Emphasis supplied.]

• • •

"Although the contractual obligation of Stevedores in this case arises through implication by the conduct of the parties, we are of the opinion that such contract was binding. Restatement, Contracts § 5 (1932). As is stated in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 1956, 350 U.S. 124, 133, 76 S.Ct. 232, 237, 100 L.Ed. 133:

'• • • This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured products. • • •'

• • •

'• • • The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.' Smith v. Jugosalvenska Linijska Plovidea, supra.

The full acceptance by the Supreme Court of the United States in Crumady of the rationale of the foregoing contractual-duty theory rather than the active versus passive negligence theory of Stevedor's liability for indemnity was anticipated and forecast by District Judge William C. Mathes in Hugev v. Dampskisaktieselskabet International, 170 F.Supp. 601 (SD Cal. 1959), later adopted as the settled rule for the Ninth Circuit in Metropolitan Stevedore Company v. Dampskisaktieselskabet International, 274 F2d 875 (Jan., 1960), (affirmal of Hugev.)

The correlative contractual duty of Petitioners (shipowner) under the stevedoring contract is clearly set forth in Hugev in the following language:

"(1) • • •

"(2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract." [Citing numerous cases, pp. 610-11.]

It is now settled that to have merely turned over and given to the use of Stevedore the malfunctioning and unseaworthy "lift gear" was not in and of itself a breach of Petitioners' contractual duty. Crumady, supra. This allowance, or maritime-license, of conduct between shipowner and stevedore is predicated upon these policy considerations discussed by Hugev:

"(a) the possibility, or even probability, of unseaworthiness after long voyages, and

(b) the expertise of the stevedoring company and its employees." Metropolitan p. 876.

We learn from Hugev that there must be something more on the part of shipowner, something in the way of a want of reasonable care, towards Stevedore.

This Court has found that in failing to discover by reasonable inspection the unseaworthy "lift gear," the Petitioners were negligent towards Libelant and that such negligence was one of the concurrent proximate causes of Libelant's injuries.[6] Assuming that such negligence of the Petitioners toward Libelant would also constitute a breach of their implied in-fact duty in favor of Stevedore to use reasonable care in discovering latent defects in the "lift gear," nevertheless such neglect can be of no avail or solace to the Stevedore; the reason being that we also find that the Stevedore, through a longshoreman and a hatch boss, had actual knowledge of the malfunctioning and unseaworthy condition of the "lift gear" prior to the accident.[7] This actual knowledge by Stevedore, even though independently obtained, intervenes and washes out any nonfeasance of Petitioners in performing their implied in-fact contractual duty to Stevedore. The Petitioners owed no duty to restrain the Stevedore from acting or using gear in the face or disregard of a known defect or danger. This is exactly what the Stevedore did when it used with full knowledge of its condition the malfunc-

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[6] "We held in Calmar v. Nacirema, decided today, 1959 A.M.C. 1083 F.(2d) , that a finding of negligence in supplying such equipment is not determinative of the shipowner's right to indemnity. His action is in contract and recovery depends upon whether his conduct has been such as to bar enforcement of the contract, and not whether he has been found negligent in regard to the longshoremen. Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563, 1958 A.M.C. 501." Cited in American Export Lines v. Revel, 266 F.2d 82 (4 Cir. 1959); 1959 A.M.C. 1073, 1081.

[7] "On the day before the accident, while in the process of topping the boom involved through the use of the lift gear, the pawls had locked in an upright position and failed to properly function by falling under gravity into a locking position, and a longshoreman had used a piece of dunnage to strike and knock the pawls into position." Excerpt from prior opinion.

tioning lift gear in connection with and incidental to the handling of the ship's cargo pursuant to its contract. The inevitable failure of the gear and resulting injuries to persons in ship's service was most probable and reasonably foreseeable by an expert stevedore. This foregoing conduct of Stevedore does not carry to and fall short of meeting the requirement that the Stevedore use gear necessary and incidental to the working of the ship's cargo with reasonable safety as tested by stevedore expertise.

From the facts found in the opinion upon the segregated issue of Petitioners' liability to Libelant and this opinion, this Court concludes that Petitioners were not short in performing their obligations to Stevedore under the stevedoring contract and that Stevedore, while engaged in its stevedoring contract to load and stow cargo, breached its implied in-fact contractual obligation to use the ship's gear, in preparation and incidental to the handling of cargo, with stevedore expertise and with reasonable safety to persons engaged in ship's service, and that such breach by the Stevedore was a proximate cause of the falling of the boom and resulting injuries to Libelant. This Court further concludes that the Petitioners are entitled to reparation from the Stevedore to the full extent of its loss, expense and damage on account of Libelant's judgment aforesaid. Hugey, at P. 612.

In the event that the parties can stipulate as to the aggregate amount of Petitioners' reparations, proctor for the Petitioners may submit proposed decree and judgment order adopting the mentioned opinions of this Court as findings of fact and conclusions of law of this Court (FRCP 52 (a)) upon which to predicate a judgment in

favor of Petitioners and against Stevedore for the amount of stipulated reparations.

In the event of a failure of such stipulation, the Court will, upon application of Petitioners, hear and determine the Petitioners' contentions as to amounts of reparations.

Dated August 3, 1960.

[Endorsed]: Filed August 3, 1960.

United States Court of Appeals
for the Ninth Circuit

Partenweederei, MS Belgrano, and Rudolph A. Oetker, Appellants, vs. George Weigel, Appellee.	No. 17,178
Brady-Hamilton Stevedore Company, Appellant, vs. Partenweederei, MS Belgrano, and Rudolph A. Oetker, Appellees.	Feb. 8, 1962

On Appeal from the United States District Court
for the District of Oregon

Before: JERTBERG, KOELSCH and DUNIWAY, Circuit Judges

JERTBERG, Circuit Judge:

George Weigel, libelant below, and appellee here, hereinafter called "libelant," was an employee of Brady-Hamilton Stevedore Company, hereinafter called "Stevedore," and acting within the course and scope of his employment when he was struck by a boom of the vessel BELGRANO, as he was operating a tractor in reverse motion and pulling with a towline a railroad car, then

loaded with lumber, upon a permanently fixed railroad spurline on the dock alongshipside for the purpose of placing the lumber under and within reach of the vessel's loading gear.

Libelant instituted his libel in admiralty, in rem against the vessel and in personam against its owner and operator, respondents below and appellants here, hereinafter collectively called "respondents." The respondents denied liability and impleaded Stevedore as third-party libelant under Admiralty Rule 56 in a cause of indemnity.

The question of the claim of respondents against Stevedore for indemnity was segregated and reserved until adjudication of libelant's claim against respondents.

Following trial on the segregated issue of liability on libelant's claim and the nature and extent of his damages, the District Court entered judgment in favor of libelant from which judgment respondents appeal.

Following trial on the segregated and reserved issue of indemnity, the District Court entered judgment to the full extent of libelant's judgment, in indemnity against Stevedore, from which judgment Stevedore appeals.

We will first consider respondents' appeal. The judgment in favor of libelant was based upon the findings and conclusions of the District Court that

> (1) The vessel was unseaworthy in that her topping "lift gear" for the starboard boom at No. 1 hatch malfunctioned and permitted the boom to fall upon the libelant because the pawls on the ratchet in the topping "lift gear" were defective and inadequate in that they did not drop into each cog as the boom was hoisted so as to prevent the boom from falling.

and that at the time of the accident libelant was engaged in performing a part of the ship's service as a longshoreman in the process of loading and storing her cargo:

(2) The respondents were negligent in:

(a) Failing to properly inspect the vessel and particularly the ratchet and pawl device to the hatch to determine the defective nature of same, since a reasonable inspection would have disclosed the malfunctioning of the pawls; and

(b) Failing to provide the libelant with a safe place to work.

The District Court further concluded that the unseaworthiness of the vessel and the concurring negligence of the respondents were the proximate causes of the falling of the boom and libelant's resultant injuries.

A detailed description of the mechanical features of the gear which operated the boom, the principles of its functioning while operating properly, the effects of its malfunctioning and the human and mechanical factors which caused the boom to fall, would unduly and unnecessarily extend this opinion. For details concerning such matters, we refer the interested reader to the opinion of the District Court reported at 189 F. Supp., p. 103 (Apr. 14, 1960), which opinion also constitutes the findings of fact and conclusions of law of the District Court.

The facts surrounding the accident are stated in the opinion (p. 107), as follows:

"Immediately prior to the commencement of the operation leading up to the accident, the ratchet notches and the pawls were in a locked position and

the lift gear was steady under the weight of the boom. The work of bringing aboard the lumber at No. 1 hatch required a topping of the boom in order to place the same in a working position, and the winch driver called to a ship longshoreman and asked for 'a hand' in attaching the free end of the pigtail line to the gypsy head. The winch operator did not see this operation, and the longshoreman involved can give no satisfactory account of what he did in the way of fixing the free end of the pigtail line to the gypsy head. In any event, it was somehow attached, but evidently not properly. The winch driver took up the slack in the pigtail line, put strain thereon, and commenced the lifting of the boom. The winch driver did not hear the 'clanking' of the pawls (dropping of the *pawls in the notches* in the ratchet rims). After raising the boom approximately three-four feet, the driver stopped the winch, braked it, and started astern to see what was wrong. Under the weight of the boom, the pigtail line started to slip on the gypsy head and the boom lift wire rope on the drum of the lift gear started to unwind. The boom in its fall gathered momentum, and the flailing free end of the pigtail line prevented the winch driver from manually putting stress upon the same. The boom, uncontrolled, fell to the starboard side of the vessel across the dock and struck the libelant. From the commencement of the raising of the boom, the unwinding of the drum, and throughout the fall of the boom, the pawls had failed to fall into the notches by gravity or otherwise.

"On the day before the accident, while in the process of topping the boom involved through the use of the lift gear, the pawls had locked in an upright position and failed to properly function by falling under gravity into the locking position, and a long-

shoreman had used a piece of dunnage to strike and knock the pawls into position."

Before considering the errors urged upon us by the respondents, we should state that respondents concede that the finding of fact of the District Court that the vessel was unseaworthy in that the pawls were stuck and failed to operate properly, is supported by ample evidence. Such finding is not challenged on this appeal by respondents or Stevedore.

Respondents' contentions are: (1) The District Court erred as a matter of law in concluding that libelant was entitled to the warranty of unseaworthiness; and (2) The conclusion of the District Court that the respondents were negligent in the respects above stated is without evidentiary support and clearly erroneous.

In holding that libelant was engaged in performing a part of the ship's service and, therefore, entitled to the protection afforded seamen, the District Court relied squarely upon the opinion of this Court in *Pope & Talbot, Inc. v. Cordray*, 258 F. 2d 214 (9th Cir. 1958). In the *Cordray* case, a longshoreman was injured while the ship was at dock and engaged in discharging its cargo. The shipowner had contracts with two stevedoring companies in the cargo operation. The contract with one stevedoring company covered the operations pertaining to the discharge of cargo from the ship's hold to the ship's side at the dock. The contract with the other stevedoring company covered the operations pertaining to the moving of cargo from the ship's side to place of rest on the dock. Cordray

was an employee of the second mentioned stevedoring company and was a foreman of the dock longshoremen. It was one of his duties to see that the cargo was moved to its first place of rest from the ship's tackle, and it was his duty also to coordinate the activities of the dock working longshoremen with those of the ship working longshoremen in order to have terminal employees and equipment available at the end of ship's tackle to keep the cargo moving. While most of the work of Cordray was done upon the dock, the evidence showed that Cordray was aboard the vessel at the time of his injury for the purpose of coordinating the cargo handling work of the dock longshoremen with that of the longshoremen working on the ship. The accident to Cordray happened when he went on board the ship to ascertain whether the gang of longshoremen on the ship were going to go home or shift to another hatch, so that Cordray could determine whether or not he would keep his dockside longshoremen available to continue the work. In the course of the opinion (pp. 217-18), this Court stated:

> "[2] In the instant case the appellee, although performing most of his work on the dock in the moving of the ship's cargo from ship's tackle to its first place of rest (which was part of the ship's obligation), was on board the ship when the accident happened. Under the testimony, he was coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock. The test is, what was the nature of his work? He was performing a service for the ship in the discharge of

its cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. The appellee's work was the work of a longshoreman and he was entitled to seaworthy gear while he was performing his service." [Footnotes omitted.]

During the trial of that case, counsel for the shipowner stipulated, "* * * that it is part of the obligation of the steamship company as carrier to not only raise the cargo out of the hold and land it on the dock, but also to place it in the warehouse." Further, it appears in that case that each of the stevedoring companies had the right to use the ship's unloading gear and equipment and to go upon such places under the shipowner's control as were reasonably necessary in the performance by the employees of each stevedoring company of the work of discharging the cargo from vessel hold to point of rest on the dock floor within the dock warehouse.

It is clear under the facts of *Cordray* that it was the contractual obligation of the shipowner to move the cargo from the hold of the vessel to a place of rest on the pier along shipside but, additionally, to move the cargo to the dock warehouse. Cordray was on board the ship when injured performing his duty of coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. He was assisting in the unloading of the ship, which is the type of work traditionally performed by seamen. Clearly he was entitled to the protection afforded seamen. The statement in *Cordray*, "* * * that the duty of providing a seaworthy ship and gear at the time of this

accident extended to the appellee, whether or not appellee was on board the ship *or on the dock*," (emphasis added) must be read in the light of the facts of that case. The *Cordray* opinion cannot be construed to extend to protection of the warranty of seaworthiness to any dock longshoreman whose injury results from unseaworthiness of a ship without regard to the type of work in which he is engaged.

Hence, unlike the facts in *Cordray*, the moving of the lumber from the dock to the vessel's loading gear was not part of the ship's service unless it can be said that the work of libelant was of the type traditionally performed by seamen.

In the instant case, the test of libelant's right to the protection of the warranty of seaworthiness is whether he was engaged in the type of work traditionally done by seamen. In *United Pilots Assn. v. Halecki*, 358 U.S. 613, 616-17, the Supreme Court stated:

> "The eventful development of the doctrine of unseaworthiness in this Court is familiar history. Although of dubious ancestry, the doctrine was born with *The Osceola* and emerged full-blown 40 years later in *Mahnich v. Southern S. S. Co.* as an absolute and nondelegable duty which the owner of a vessel owes to the members of the crew who man her. The justification for this rigid standard was clearly stated in the Court's opinion in *Mahnich*:
>
> "'He [the seaman] is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers.' 321 U.S. 96, at 103.

"With the nature of the duty thus defined, it remained for two other decisions of the Court to amplify its scope. *Seas Shipping Co. v. Sieracki* and *Pope & Talbot v. Hawn* made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship. See 346 U.S., at 413."

In the *Halecki* case, recovery under the doctrine of unseaworthiness was denied upon the ground that the work of the injured workman, who had gone aboard to clean the generators with carbon tetrachloride, was in no way the "type of work" traditionally done by the ship's crew, and it was held that to extend liability for unseaworthiness to the decedent would "distort the law of Mahnich, of Hawn and Sieracki beyond recognition."

The evidence of this case relating to the nature of libelant's work is not in dispute. The libelant was driving a tractor on the dock. His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performed solely on the dock and in an operation preliminary to, but separate from, the work of loading the lum-

ber onto the vessel. Although libelant's work brought him close enough to the vessel to be injured by the falling boom, liability arises not from the place of injury but from the nature of the work being performed.

Was the nature of libelant's work of the type traditionally performed by seamen? The only affirmative testimony in the record on the subject is uncontradicted expert testimony to the effect that libelant's work was not of the type traditionally performed by seamen. In our view, the District Court's reliance on *Cordray* was misplaced.

The burden of proof was upon libelant to show that he was entitled to the protection afforded seamen. In our view, he failed to do so. In so holding, we do not purport to lay down a fixed line of demarcation between "seamen's work" and "shoreside work." Our holding is simply that the libelant failed to meet his burden of proving that the nature of the work performed by him was the "type of work" traditionally performed by seamen.

We will now consider respondent's second contention that the finding and conclusion of the District Court with respect to negligence on the part of respondents is without evidentiary support.

The vessel was of German design, newly-built, engaged as a freighter, and appeared clean. The vessel's starboard boom at her No. 1 hatch was fitted with a topping "lift gear" of German design, semi-automatic in operation, and a permanently affixed appurtenance of the vessel. The "lift gear" was safe and in nowise an inherently dangerous appurtenance when functioning properly.

The vessel had five hatches, each with at least two "lift gears."

The vessel had been to Vancouver, B.C. where it worked on October 6th and 7th prior to its arrival at Portland. The vessel arrived at Portland on the morning of October 9th. Early that morning, before the stevedores commenced working, the ship's crew used the topping "lift gear" machinery to raise the booms, including the No. 1 starboard boom, from their cradles to a raised position so that they would be ready for use by the stevedores.

From then until the accident on the following day of October 10th, the booms remained raised. Later in the morning of October 9th, while the stevedores were changing the position of No. 1 starboard boom, they discovered that the pawls were struck, and one of the stevedores used a board to pry them into place on the ratchet. This fact was never reported to any of the ship's officers or crew, although known to the stevedore's hatch boss. There is no evidence that any officer or member of the crew was aware of such malfunctioning. The "lift gear" at No. 1 hatch was used throughout the rest of the day of October 9th. The accident occurred on the morning of October 10th, the circumstances of which have been previously detailed.

There is no evidence in the record of any foreign materials in and about the working elements of the ratchets, notches, pawls and the bearing of the pawl axle, nor physical damage of the working parts immediately prior to the accident, and the District Court so found. As to the cause of the malfunctioning, the District Court stated,

"The law of physics tells us that it is reasonable to infer that some abstract and necessarily patent binding force or strain among the working parts prevented a normal automatic mechanical action and function (dropping of the pawls by gravity) and thereby destroyed the usefulness and safety of the gear and rendered the same dangerous and unsafe."

The fact that the vessel was found to be unseaworthy because the pawls in the "lift gear" were defective and inadequate, does not establish negligence on the part of the respondents. The duty to furnish a seaworthy ship is absolute and non-delegable. It is a specie of liability without fault. Hence, the burden of proof rested with libelant to establish, by a preponderance of evidence, that negligence on the part of respondents was a proximate cause of libelant's injuries and damages.

The District Court concluded that respondents were negligent in failing to properly inspect the pawl and ratchet device to determine the defective nature of the same. It was libelant's burden to establish that respondents breached a duty owing to libelant. The District Court did not mention the nature of the duty owing by respondents to libelant, but we assume in light of the Court's finding that the breach consisted of the failure of respondents to properly inspect the pawl and ratchet device, that the duty owing by respondents was to make a reasonable inspection to see that the gear and equipment furnished by them operated properly.

There is no intimation in the written opinion of the District Court that in reaching the conclusion of negligence, the Court relied in any way upon the doctrine of

res ipsa loquitur, nor does libelant make any such contention on his appeal. Hence, negligence cannot be inferred from the mere happening of the accident, nor does the accident establish a prima facie case of negligence on the part of the respondents. Notwithstanding proof of the happening of the accident, the full burden of proof of negligence remained on the libelant.

Proof offered by the respondents, which we do not detail in this opinion, is of no help to libelant since all such proof tended to establish that the vessel's gear and equipment were functioning normally and properly when the stevedores took over the cargo loading operations. Libelant argues that the trial Judge was not required to accept such testimony in view of the happening of the accident and the discovery by the stevedores, shortly after they commenced their cargo loading operations, of the malfunctioning of the pawl and ratchet device. We agree. However, disbelief by the Court of such proof does not establish a breach of respondents' duty to make a reasonable inspection to see that the gear and equipment furnished for the cargo loading was in good condition and operating normally. The burden of proof was upon the libelant to establish negligence and not upon respondents to establish freedom from negligence.

What did libelant establish? He established: (1) That the accident occurred; (2) That it occurred because of the malfunctioning of the pawl and rachet device; and (3) That the stevedores discovered the malfunctioning of the device shortly after cargo loading operations commenced on the day before the accident. From these facts, libelant contends that the District Court properly inferred that a

reasonable inspection by respondents would have revealed the cause of the malfunctioning. The vice of that argument is the absence from the record of any testimony establishing, or tending to establish, the standard of conduct which respondents were required to meet in discharge of their duty to make a reasonable inspection to see that the gear and equipment furnished by them operated properly. There is no testimony in the record of what conduct on the part of operators and owners of vessels of the type or similar to the type of the BELGRANO and similarly equipped, was usual or customary or required by good practice or by law or regulation in making inspection of gear and equipment. Is the standard of conduct met by a visual inspection of the gear and equipment? Does the standard of conduct require an operational test of the gear and equipment of a vessel? Does the standard of conduct require constant inspection? Does the standard of conduct require daily inspection? Does the standard of conduct require inspection before and after each use of the gear and equipment? The record leaves us completely in the dark in attempting to find answers to these questions.

On the record in this case, we are constrained to hold that the libelant failed to meet the burden of proof resting upon him of establishing negligence on the part of the respondents.

The District Court also concluded that the respondents were negligent in failing to furnish libelant with a safe place to work. This point is not mentioned in any of the several briefs which have been filed. There is no evidence in the record that the respondents furnished or were in

any way obliged to furnish to libelant the place to work where he was working. The District Court's conclusion of negligence on this point is wholly unsupported.

The judgment and decree from which respondents appeal is reversed.

This disposition of the case makes it unnecessary to consider the question of indemnity since the decree of indemnity rests upon the judgment and decree which is reversed by this opinion. The decree of indemnity is likewise reversed.

(Endorsed) Opinion Filed Feb. 8, 1962.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

Partenweederei, MS Belgrano, and Rudolph A. Oetker, Appellants, vs. George Weigel, Appellee.	No. 17,178
Brady-Hamilton Stevedore Company, Appellant, vs. Partenweederei, MS Belgrano, and Rudolph A. Oetker, Appellees.	ORDERS May 21, 1962

Before: JERTBERG, KOELSCH and DUNIWAY, Circuit Judges.

On February 8, 1962, this Court entered its judgment reversing the decree of the Court below dated May 31, 1960 in favor of appellee George Weigel and against appellants Partenweederei, MS Belgrano, and Rudolph A. Oetker and reversing, without consideration on the merits, the decree of indemnity of the Court below dated November 16, 1960, in favor of appellees Partenweederei, MS Belgrano, and Rudolph A. Oetker, and against appellant Brady-Hamilton Stevedore Company.

On April 9, 1962, this Court granted the petition of appellees Partenweederei, MS Belgrano, and Rudolph A.

Oetker for a limited rehearing as to that part of the judgment of this Court relating to the decree of indemnity, and fixed May 14, 1962 as the date for oral argument on said petition, and on said day the matter was submitted to this Court for decision.

It now appears that appellee George Weigel intends to petition the Supreme Court of the United States for a writ of certiorari from the judgment of this Court dated February 18, 1962 reversing the decree of the Court below dated May 31, 1960.

IT IS THEREFORE ORDERED:

1. That part of the judgment of this Court reversing the decree of indemnity dated November 16, 1960, is vacated and set aside, and re-submission thereof to this Court for decision is deferred until either the time for a petition by appellee Weigel to the Supreme Court of the United States has expired, or, if such petition is filed, until final action thereon by the Supreme Court of the United States;

2. If the Supreme Courts of the United States shall grant a petition for certiorari and reverse the judgment of this Court relating to the decree dated May 31, 1960, then this Court will decide upon the merits, upon the briefs and records heretofore filed and without further argument, the appeal of Brady-Hamilton Stevedore Company from the decree of indemnity dated November 16, 1960;

3. The submission to this Court on May 14, 1962 for decision on rehearing of the petition of appellees Partenweederei, M/V Belgrano, and Rudolph A. Oetker is vacated and re-submission thereof is deferred. If the time

within which appellee Weigel can petition to the Supreme Court for a writ of certiorari shall expire, or if the Supreme Court shall affirm the judgment of this Court insofar as it relates to the decree dated May 31, 1960, then this Court will decide, upon the briefs and record now on file and without further argument, the question as to whether appellees Partenweederei, et al., are entitled to indemnity against Brady-Hamilton Stevedore Company for their costs of defending the action of Weigel against them in the Court below and in this Court.

DATED: May 21, 1962.

(Endorsed) Orders Filed May 21, 1962.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

Partenweederei, MS Belgrano, and Rudolph A. Oetker,

Appellants,

vs.

George Weigel,

Appellee.

No. 17,178

Brady-Hamilton Stevedore Company,

Appellant,

vs.

Partenweederei, MS Belgrano, and Rudolph A. Oetker,

Appellees.

Dec. 11, 1962

Appeal from the United States District Court for the District of Oregon

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On Rehearing

Before: JERTBERG, KOELSCH and DUNIWAY, Circuit Judges.

PER CURIAM

Following our decision in this matter (Partenweederei, MS Belgrano v. Weigel, 299 F.2d 897, February 8, 1962), Shipowners petitioned for a rehearing, on the ground that they were entitled to judgment against Stevedore for indemnity for the expenses incurred, both here and in the District Court, in successfully defending the libel. We

granted the petition for rehearing and thereafter vacated the portion of our judgment reversing the decree of indemnity, and the submission of the matter on rehearing, pending final disposition of libelant Weigel's petition to the Supreme Court for certiorari. (Partenweederei, MS Belgrano v. Weigel, 302 F.2d 730, May 21, 1962). The Supreme Court denied certiorari on October 8, 1962 (..... U.S. .....), and on November 13, 1962, denied a rehearing. We treat this denial as an affirmance within the meaning of paragraph 3 of our order of May 21, 1962, supra.

As is there stated, the question now before us is whether Stevedore must indemnify Shipowners for their costs of defending the action of Weigel against them in the trial court and in this court. "Costs" as here used means "expenses," not merely taxable costs.

Stevedore contends that the answer to the question is "no," for two reasons: (1) that such relief was never asked, and the question was never raised, until the filing of the petition for rehearing, and (2) that in any event, the expenses of a successful defense are not recoverable by the Shipowner under the implied warranty of workmanlike service to which Stevedore, by fiat of the Supreme Court, is subject.

(1) It is the fact that the relief which Shipowners now claim was never requested in the trial court or here, until the petition for rehearing was filed. They point to the "such other and further relief" language in the prayer of their petition impleading Stevedore, but the pre-trial order contains no claim for this relief; it states their position to be that they are entitled to indemnity "if . . . (Shipowners) herein should be held liable in this case to libelant."

Ordinarily, claims for relief or other new matter cannot be first asserted on petition for rehearing. *Higa v. Transocean Airlines*, 9 Cir., 1956, 230 F.2d 780, 786, *petition for cert. dismissed*, 1956, 352 U.S. 802; *General Ins. Co. v. Pathfinder Petroleum Co.*, 9 Cir., 1944, 145 F.2d 368, 373, *cert. denied*, 1945, 324 U.S. 844; *Mitchell v. Greenough*, 9 Cir., 1939, 100 F.2d 1006, *cert. denied*, 1939, 306 U.S. 659. But there may be exceptional cases. See *Carter v. United States*, 5 Cir., 1943, 135 F.2d 858, 864. The question is, is this such a case? We think not.

It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom, and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below. We find here no persuasive reason for making an exception.

(2) We therefore expressly refrain from deciding the question on the merits.

The "Final Decree (Re: Indemnity)," dated November 16, 1960, is reversed.

(Endorsed) Per Curiam Opinion on Rehearing Filed December 11, 1962.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

Partenweederei, MS Belgrano, et al., Appellants, vs. George Weigel, Appellee.	No. 17,178
Brady-Hamilton Stevedore Company, Appellant, vs. Partenweederei, MS Belgrano, et al., Appellees.	

JUDGMENT

Appeal from the United States District Court
for the District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjuged by this Court, that the "Final Decree" of the said District Court in this cause (Re: Indemnity) dated November 16, 1960 be, and hereby is reversed, with costs in favor of Brady-Hamilton Stevedore Company and against Partenweederei, MS Belgrano and Rudolph A. Oetker.

It is further ordered and adjudged by this Court that Brady-Hamilton Stevedore Company recover against Partenweederei, et al., for its costs herein expended, and have execution therefor.

It is further ordered and adjudged by this Court that Partenweederei MS BELGRANO and Rudolph A. Oetker have and recover of and from appellee George Weigel its costs herein expended, including the portion of the cost of transcript and printing record on appeal taxed against them and in favor of Brady-Hamilton Stevedore Co
and have execution therefor.

Filed and entered December 11, 1962, as amended by order of January 29, 1963.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

Partenweederei, MS Belgrano, and Rudolph A. Oetker, Appellants, vs. George Weigel, Appellee.	No. 17,178
Brady-Hamilton Stevedore Company, Appellant, vs. Partenweederei, MS Belgrano, and Rudolph A. Oetker, Appellees.	

ORDER

The petition of appellees for rehearing on decision on indemnity filed herein on January 2, 1963 is denied.

It appearing that appellants Partenweederei, MS Belgrano and Rudolph A. Oetker on the one hand, and appellant Brady-Hamilton Stevedore Company on the other hand, each paid one-half of the cost of the record on appeal in this matter from the decree in favor of appellant Weigel, it is

ORDERED that there shall be included in any costs taxed in favor of Partenweederei, MS Belgrano and Rudolph A. Oetker against appellee George Weigel the portion of the cost of transcript and printing record on

appeal which may be taxed as costs in favor of Brady-Hamilton Stevedore Company against said Partenwederei, MS Belgrano and Rudolph A. Oetker.

Dated: January 29th, 1963.

Gilbert H. Jertberg
M. Oliver Koelsch
Ben C. Duniway
United States Circuit Judges

(Endorsed) Filed January 29, 1963.

Frank H. Schmid, Clerk.